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QUESTIONS PRESENTED

1. May the States' retained sovereign title to the beds of navigable waterways be transferred to the federal government by operation of a federal statute of limitations?

2. Did Congress clearly intend that the limitations provision of 28 United States Code section 2409a be applicable where States are asserting ownership of sovereign lands reserved to them under the Constitution?

3. Is the Quiet Title Act applicable at all to an action against federal officers to restrain their tortious interference with a State's sovereign property rights in the bed of a navigable waterway?

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No. 81-2337

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

JOHN R. BLOCK, Secretary of Agriculture, et al.,
Petitioners,

VS.

THE STATE OF NORTH DAKOTA, ex rel. BOARD OF UNIVERSITY AND SCHOOL LANDS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, LOUISIANA, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW JERSEY, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, WASHINGTON, AND WYOMING ON BEHALF OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The issue here is whether the mere passage of time, when coupled with a bare claim of federal ownership that may have absolutely no basis, may work a transfer to the federal government of lands in the beds of navigable waterways that are owned in trust by the States by virtue of their retained sovereignty. Petitioners argue that 28 United States Code section 2409a clearly contemplates such transfer of state sovereign title. This extreme position would, if accepted, threaten widespread loss of state sovereign land title by a means that no one, including the federal government, would have thought possible prior to 1972, when the Quiet Title Act (86 Stat. 1176) was enacted. The case implicates the very substance of the constitutional compact whereby a residuum of sovereignty was not delegated by the States to the new national government but rather was retained by them as sovereigns.

Prior to the recent reliance by the federal government on the limitations provision of the 1972 Quiet Title Act, no one supposed that, as between the federal government and the States, title to the States' sovereign trust lands could be determined not by a suit on the merits, but by mere passage of time. This Court has frequently entertained such suits by the federal government under its original jurisdiction. Defenses based on laches or the statute of limitations have been rejected as inapplicable. (See *United States v. California* (1947) 332 U.S. 19, 39-40.) Further, the States had at their disposal suits against federal officers to enjoin wrongful use or possession of state lands in navigable waterways. Such suits often incidentally involved questions of title, but no statute of limitations was ever applied to bar such actions.

Now, for the first time, and based on the federal government's interpretation of a recent enactment that comes almost two hundred years after the adoption of the Constitution, the government is asserting that such a time bar can

transfer to it a State's sovereign title in navigable waterways, quite independent of the merit of the government's mere *claim* of ownership. The government's theory does not even require that its claim rise to the level of adverse possession, which can operate to transfer title to some types of land, given the passage of a prescribed time period (often as long as twenty years) *and* affirmative use of the property that is "actual, notorious, exclusive and continuous."[1] Rather, according to petitioners, a mere "claim" will suffice.

As is evident in the case at bar, petitioners' argument has a particularly draconian twist. Here, they argue that North Dakota was "on notice" of the federal claim in 1955, that the twelve-year limitation period of 28 United States Code section 2409a(f) ran in 1967, and that North Dakota was therefore barred from asserting its claim, even though this was some five years before Congress created what is allegedly the State's sole right to maintain the action. (Petitioners' Br. 34, 35.) This is hard law indeed. Can this be a correct statement of the law, at least as it relates to lands in the beds of navigable waterways, lands that the States claim by virtue of their retained sovereignty?

We submit that it cannot be correct. The extent of the waterways subject to possible federal claims is vast. By conservative estimate, there are 78,444 square miles (over fifty million acres) of land covered by inland waters in the fifty States.[2] The shoreline along tidal waterways alone totals an estimated 88,633 miles.[3] And the United States is by far the largest holder of littoral upland title along

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[1]See generally, 7 Powell on Real Property (1982 ed.) ¶ 1013[1], pp. 91-11, 91-12, ¶ 1014.

[2]Statistical Abstract of U.S. (101st ed. 1980) table 354, p. 209. Notably, this figure does not include streams less than one-eighth of a mile in width, thus excluding the vast majority of navigable rivers and streams in this country. (*Id.*, at fn. 2.)

[3]*Id.*, table 355, p. 210.

such waterways. Including Indian lands administered in trust, the United States owns over 36 percent of the land in this country, some 822,000,000 acres, which is almost five times the land area of the State of Texas.[4] Just along tidal waterways, the United States is the owner of approximately 45,290 miles of shoreline, over one-half of the total.[5] Inland, its vast holdings are threaded with rivers and streams and dotted with lakes, many of them navigable and thus claimed as sovereign land by the States. Other potential title disputes lie waiting in tidal and freshwater marshes, where, unlike most rivers and lakes, the line between the waterway and the uplands is indistinct and difficult to locate.

The uncertain nature of title to the beds of navigable waterways further complicates the matter, for the problem is not merely one of the sheer magnitude of possible federal claims. As this case demonstrates, whether a waterway is "navigable" can be subject to conflicting factual assertions. Further, the States' retained sovereign title to submerged lands continually shifts with avulsion and accretion along the watercourses overlying such land. Rivers defy any attempt at imposing finality on adjudications of water boundaries along them. The Colorado river, for instance, which runs through or forms the boundary of the States of Arizona, California, Colorado, Nevada, and Utah, has frequently been the subject of litigation over title. (E.g., *United States v. Utah* (1931) 283 U.S. 64; *California v. Arizona* (1979) 440 U.S. 59.) And other rivers, such as the "fickle" Missouri, have "refused to be bound by a Supreme Court decree." (See *Nebraska v. Iowa* (1972) 406 U.S. 117, 119.) Every shift in a river's course can result in new "claims" by the federal government as littoral owner, thus continually eroding state sovereign title because all such "claims" may ripen into title, under the government's theory, with the mere passage of time.

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[4] *Id.*, table 395, p. 237, table 397, p. 238, table 403, p. 241, table 354, p. 209.

[5] *Id.*, table 398, p. 237.

The unmanageable implications for the States of the petitioners' argument are manifest. It is simply not possible for the land agencies of the various States, with their small staffs and limited budgets, to comprehensively monitor the large number of federal title claims to these lands that may presently exist or that will undoubtedly arise in the future. Especially is this true where the claim need not be coupled with overt use and occupation, and no requirement exists that the State be directly and unequivocally notified of the claim. Many such claims may have been barred, under petitioners' theory, even before passage of the Quiet Title Act, even though, upon later examination, the waterway might be found to be navigable and hence owned by the State upon its admission to the Union.

In short, if applied over such a vast acreage to claims regarding a title that is inherently uncertain, the subject statute of limitations will have the necessary result of transferring hundreds of thousands of acres of the States' sovereign submerged lands to the federal government. And in federal ownership, the lands will have no special status as lands held for the citizens of the respective States under the common law trust that exists in navigable waterways owned by the States as sovereigns. The federal government will be free to dispose of such lands as it chooses, free of the constraints of the public trust doctrine.

The danger is not speculative. The asserted bar of section 2409a's limitation period has already been raised on numerous occasions against state sovereign land claims.[6] So far, where it has been squarely presented, the

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[6]E.g., *State of North Dakota ex rel. Board of University and School Lands v. Andrus* (D. N.D. 1981) 506 F. Supp. 619; *State of California ex rel. State Lands Commission v. United States* (N.D. Cal. 1981) 512 F. Supp. 36; *State of California ex rel. State Lands Commission v. Yuba Goldfields* (E.D. Cal.) No. Civ. S-79-733 RAR; *Commonwealth of Puerto Rico v. United States* (D. P.R.) No. Civ. 80-2079-C.C.; *Utah v. United States* (D. Utah) No. Civ. C-79-0302J.

lower courts have resolved the question favorably to the States. But petitioners are now arguing in this Court that these cases are wrong.

Regardless of the force of petitioners' arguments when directed at the claims of private citizens, or even at the claims of the States when *sovereign* title is not at issue, these arguments must be rejected in the narrow situation presented here, where the States' retained sovereign trust title to the beds of navigable waterways is at stake. The United States Constitution requires it.

SUMMARY OF ARGUMENT

When the Revolution took place, the thirteen original States obtained title to the beds of navigable waterways as independent sovereigns and in trust for their people. When these States later adopted the Constitution, they delegated much of their sovereignty to the newly created federal government for the common good. However, a residuum of sovereignty was retained by the States. One major, undelegated element of sovereignty was the States' title to "sovereign" lands—the lands beneath navigable waterways. States later admitted to the Union also obtained title to the beds of navigable waterways, not by any grant from Congress, but by virtue of their status as sovereigns equal in stature to the original States under the Constitution. This sovereign title, never granted or otherwise delegated to the federal government, may not be lost through application of any rule of federal law.

Petitioners nonetheless contend that just such a federal rule operates to transfer title to state sovereign lands here. They contend that 28 United States Code section 2409a(f), a statute of limitations enacted by Congress with regard to quiet title actions generally, may be applied so as to transfer a State's title to sovereign trust land to the federal government.

After adverting to the special nature of the States' title to sovereign lands held in trust for their people, the court

of appeals determined that Congress had not intended to make the limitation period of section 2409a(f) applicable to a State when an issue of title to sovereign lands was presented. The twenty-eight amici States agree with the narrow determination of the court of appeals. But we will discuss as well the broader issues raised by petitioners below and before this Court.

1. Even assuming a congressional intent to include state sovereign land claims within the limitation period of section 2409a(f), any such intent could not be given effect.

a. Regarding the unique circumstance of a dispute between the federal sovereign and a sovereign State involving title to lands that the State claims by virtue of its retained sovereignty, a statute of limitations may not be defended as a condition to the waiver of sovereign immunity. In a clash between federal and state sovereigns over land in a waterway where the State grounds its claim on a retained sovereign right, "sovereign immunity" attaches to the federal government only if it is truly the superior sovereign. And in such controversies, the federal government is the superior sovereign only if it does indeed own the land. In such circumstances, the plan of the Constitution gives a right to either government to sue the other, in order to resolve the *threshold* question of whether ownership, and thus superior sovereignty, indeed lies with the federal government. To *assume* that the federal government owns the land in question, and therefore to conclude that it has sovereign immunity because it is the "superior sovereign", merely begs the question. Regarding title to the beds of their waterways, the States have at least a constitutional right of access to the courts, so that the question of which sovereign holds title, and hence the question of any federal sovereign immunity, may be answered by the courts, and not unilaterally by federal officials.

1. Regardless of the justification proffered, Congress may not, consistent with the retained state sovereignty over the beds of navigable waterways guaranteed in the Constitution, enact a rule that can work an alienation of a State's sovereign title. The States cannot lose the public's trust title in such lands by application of doctrines such as adverse possession, statutes of limitations, or equitable estoppel. This rule, recognized in both state and federal courts without exception, is inextricably bound up with the States' sovereign title. Again, the States are constitutionally entitled to access to the courts to obtain a determination on the threshold issue of ownership. If the State indeed owns the land as sovereign land, then as a matter of retained state sovereignty a federal statute of limitations may not be invoked to deprive it of title. Just as Congress may not constitutionally limit the jurisdiction of the Supreme Court in cases involving sovereign land title disputes, it may not constitutionally impose a statute of limitations that violates an element of state sovereignty reserved to the States as part of the compact by which the Constitution was adopted.

2. At minimum, given the grave constitutional problems presented by asserted application of a limitation period to the sovereign land claims of the States, a clear and unequivocal statement by Congress of the statute's application to the States is necessary. Section 2409a(f) contains no such congressional statement.

3. Neither the Quiet Title Act nor its statute of limitations is applicable here at all. The limitation period of section 2409a is applicable only to quiet title actions. It does not apply to suits to enjoin wrongful conduct of federal officers, which have long been sanctioned by this Court, even though such actions may sometimes incidentally involve federal land title claims. Such actions have a basis in law distinct and independent from actions to quiet title against the United States itself. Such actions

are particularly appropriate where title was never admittedly in the federal government and where the State's claim is to sovereign lands reserved to it under the Constitution. In an era when it has continually *cut back* the scope of sovereign immunity, Congress surely did not intend to *expand* the doctrine's reach by barring such independent actions against federal officers.

ARGUMENT

I. A STATUTE OF LIMITATIONS ENACTED BY CONGRESS CANNOT DEPRIVE A STATE OF ITS CONSTITUTIONALLY RESERVED SOVEREIGN TRUST LANDS

With the adoption of the Constitution, the States surrendered to the newly created national government much of the sovereignty that they had exercised as independent States. Their sovereignty was further limited by later adoption of the various Amendments. But it is also true that some elements of sovereignty were not delegated to the national government and instead were retained by the States. The Union "was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty *not delegated to the United States by the Constitution itself.*" (Emphasis added.) (*Coyle v. Oklahoma* (1911) 221 U.S. 559, 567; accord, *Massachusetts v. United States* (1978) 435 U.S. 444, 455; *Collector v. Day* (1870) 78 U.S. (11 Wall.) 113, 124.)

Congress may not impair this undelegated sovereignty of the States. (*Coyle v. Oklahoma, supra,* 221 U.S. 559 (enabling act for creation of State may not prescribe location of state capital); *Cincinnati v. Louisville & Nashville R.R. Co.* (1912) 223 U.S. 390 (Northwest Ordinance of 1787 could not limit State's power of eminent domain); *Lane County v. Oregon* (1868) 74 U.S. (7 Wall.) 71 (State's power to tax).) This limitation on congressional power has been recognized even in situations where, unlike here, Congress has invoked against a State one of the powers expressly delegated to it by the Constitution. (See

National League of Cities v. Usery (1976) 426 U.S. 833, 842-845 (state sovereignty an implied limitation on the commerce power); *Massachusetts v. United States, supra,* 435 U.S. 444, and *New York v. United States* (1946) 326 U.S. 572, 582 (inter-governmental tax immunity); *Federal Energy Regulatory Commission v. Mississippi* (1982) ..... U.S. ....., 102 S. Ct. Rptr. 2126 (distinguishing *Usery*).)

One of the most important elements of the States' retained sovereignty is their title to the beds of navigable waterways, which are held in trust for the benefit of their people. State ownership of such lands derives from principles of the common law of England whereby the Crown held such lands, in trust, by virtue of its sovereign prerogative. (*Shively v. Bowlby* (1894) 152 U.S. 1, 11-13; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 435-437.) When the Revolution took place, the original States succeeded to such title as independent sovereigns, and that title was not granted or otherwise delegated by them to the new national government. (*Martin v. Waddell* (1842) 41 U.S. (16 Pet.) 366, 410; *Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How.) 212, 229-230.) Later-admitted States succeeded to this same title, not by virtue of any congressional grant, but by virtue of their status as sovereigns equal in stature to the original States under the constitutionally based equal footing doctrine. (*Pollard's Lessee, supra,* at pp. 223, 229-230; *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 370, 373-374.)

This title in the States is an inherent attribute of their sovereignty. (*United States v. Mission Rock Co.* (1903) 189 U.S. 391, 404; *Hardin v. Jordan* (1891) 140 U.S. 371, 381.) "The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged. . . ." (*Massachusetts v. New York* (1926) 271

U.S. 65, 89.) Accordingly, this Court has ruled that a State's title to such land vests absolutely upon statehood and is not subject to later defeasance by operation of federal law. (*Corvallis, supra,* 429 U.S. at pp. 370-371, 374, 386.)

A. Where a State Is Suing to Protect Its Sovereign Title in a Navigable Waterway, It May Not Be Barred by a Federal Statute of Limitations Premised on an Assumed Immunity from Suit

We accept as a truism petitioners' statement that, "within its sphere, our Constitution gives the national Government ultimate supremacy." But to say, based on this premise, that the federal government is the "superior sovereign" and hence entitled to sovereign immunity from suit, is merely to suggest the relevant question here, not answer it. In the unique circumstance of a suit in which a State is claiming title to lands by virtue of its *retained sovereignty,* may it be *assumed* at the outset that the federal government is the "superior sovereign"?

We do not here challenge the general doctrine of federal sovereign immunity, or even its application to the States in situations other than the unique case here presented.[7] Where a citizen sues the United States, there is clearly only one sovereign, and immunity applies. Neither do we argue here that the conclusion is changed simply because the other party is a "sovereign" State. We note, for instance, that federal sovereign immunity has been recognized where a State's title claim derived solely from a congressional enactment regarding lands that were, at the

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[7]It is nevertheless true that the theoretical underpinnings of the doctrine in this country are far from clear. (See *United States v. Lee* (1882) 106 U.S. 196, 205-207; Hart & Wechsler, The Federal Courts and the Federal System (2d ed. 1973) pp. 1339-1344.) Also uncertain is the basis for the general assertion in *Kansas v. United States* (1907) 204 U.S. 331, made without discussion, that a State may not sue the federal government without its consent. (See *Hart & Wechsler, op. cit. supra,* at p. 256.)

time of the enactment, concededly part of the federal public domain and could vest in the State only by congressional grant. (E.g., *Hawaii v. Gordon* (1963) 373 U.S. 57; *New Mexico v. Lane* (1917) 243 U.S. 52; *Oregon v. Hitchcock* (1906) 202 U.S. 60.) And, on the issue of sovereign immunity, we concede for purposes of argument that the doctrine applies to state claims under such congressional grants against the federal public domain where any state title would be impressed with a "trust". (See *Lassen v. Arizona Highway Dept.* (1967) 385 U.S. 458 (lands granted to a State "in trust" for educational purposes).)[8]

But the situation is different where a State sues to protect its retained sovereign title to the bed of a navigable waterway. If indeed the State owns the land as a sovereign, and not the federal government, the State is not contending with a "superior sovereign". Petitioners talk about title being "wrested" from the federal government and "transferred" to the State as a reason for invoking sovereign immunity here. (Petitioners' Br. 11, 20, 21.) This argument chases its tail. It *assumes,* pre-litigation, that the federal government holds title to the waterway. But if the State indeed owns the land by virtue of its retained sovereignty under the Constitution, the judgment will not "expend itself on the public domain." Whatever the propriety of the federal government's argument vis-à-vis a private

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[8]Nor does a discussion of the special nature of the States' sovereign land title relate in any way to any federal power of direct or inverse condemnation of state sovereign lands pursuant to some power delegated to the federal goverment. (See Petitioners' Br. 18, 19.) Rather, we are dealing solely with a mere claim of title by a federal officer. If it is finally determined that the federal government doesn't own the land, that may be the end of it, for the government may elect not to condemn the land. (See Hart & Wechsler, *op. cit. supra,* at pp. 1374-1375.) But if the government wishes to acquire the land, only then might the federal eminent domain power come into play (see 28 U.S.C. § 2409a(b)), and then only if it were justified in furtherance of some power delegated to the federal government by the Constitution. That is another case.

citizen, it must be rejected where a State is asserting retained sovereign title to lands guaranteed it by the Constitution.

This is one of those rare situations in which the doctrine of sovereign immunity is rendered inapplicable by the very nature of the constitutional compact. (See *Principality of Monaco v. Mississippi* (1934) 292 U.S. 313, 322-323, 328-329; *United States v. Texas* (1892) 143 U.S. 621, 646.) *United States v. Texas* was an original action involving a dispute over the boundary between the Territory of Oklahoma and the State of Texas. The Court recognized the doctrine of sovereign immunity, but nonetheless held that the States had consented to such suits by the United States by virtue of the constitutional scheme:

> "The submission to judicial solution of controversies arising between these two governments, 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' *McCulloch v. State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty." (*Ibid.*)

The same underlying constitutional postulate applies here. If a State sues the federal government over land, asserting that its title derives from its retained sovereignty, the "superior sovereignty" of the federal government cannot be assumed. Rather, the State at least enjoys a right of access to the courts, implied under the plan of the Constitution, so that the courts, and not the United States, may determine the question of title,[9] and hence the question of whether superior federal sovereignty is implicated. The

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[9]This Court has held that the federal government has no authority to unilaterally determine federal ownership claims regarding the sovereign lands of the States, and that such questions are committed to judicial resolution. (*Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 16-19.)

federal government's consent to suit is inherent in the constitutional scheme.[10] In such a situation, determination of the threshold jurisdictional question will determine the merits as well, but there is nothing novel in that. (See *Land v. Dollar* (1947) 330 U.S. 731, 735; *Ritter v. Morton* (9th Cir. 1975) 513 F.2d 942, 945-946.)

None of the cases cited by petitioners impugn this conclusion. The bulk of them are irrelevant, because they were suits involving asserted state land entitlements that were based on dispositions by Congress of what was admittedly the nation's public domain. Any broad statements concerning the federal government's immunity from suit by the States were therefore not made with reference to state title claims to sovereign land, and must be limited to their context.[11] The only cited cases that deal even tangentially with the issue here presented are *California v. Arizona* (1979) 440 U.S. 59, and *California ex rel. State Lands Commission v. United States* (1982) ..... U.S. ....., 102 S.Ct. Rptr. 2432, and in neither of these cases did the Court decide the question.

The precise issue decided in *California v. Arizona* was a narrow one: did Congress intend to deprive the Supreme Court of its original jurisdiction over cases to which a State was a party? The Court avoided the constitutional question that would have been presented had that been

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[10]Cf. *Massachusetts v. United States, supra,* 435 U.S. at pp. 455, 459, recognizing that, despite the supremacy clause, the immunity of traditional state sovereign functions from the national taxing power is "implied from the States' role in the constitutional scheme." (*Id.,* at p. 455.)

[11]The following cases all dealt with claimed state entitlements to federal public domain lands under specific congressional enactments: *Kansas v. United States, supra,* 204 U.S. 331; *Oregon v. Hitchcock, supra,* 202 U.S. 60; *State of Louisiana v. Garfield* (1908) 211 U.S. 70; *New Mexico v. Lane, supra,* 243 U.S. 53; *Hawaii v. Gordon, supra,* 373 U.S. 57; *Minnesota v. Hitchcock* (1902) 185 U.S. 373.

the congressional intent by implying an exception to the provision in the Quiet Title Act which conferred "exclusive" jurisdiction on the district courts. The Court found this exception for cases where a State was the suing party despite the general language of 28 United States Code section 1346(f), which made no express exception for States. It is true that the opinion contains some general statements concerning sovereign immunity, but this may have been because the State did not challenge the validity of the limitations provision in the context of the hearing on its motion for leave to file the complaint. The Court itself noted that its own decision in *United States v. Texas, supra,* 143 U.S. 621—a federal-state boundary case—suggested a conclusion contrary to general statements and dicta in other cases regarding the question of sovereign immunity. (440 U.S. at p. 63.) In short, the Court was not liberally construing the statutory language to make the United States amenable to suit, but rather to avoid attributing an intent to Congress that would present a constitutional question regarding congressional power to curb the Court's original jurisdiction. In no way may the opinion's dicta concerning sovereign immunity be construed as a holding that the federal government is immune from suit by a State where a State's retained sovereign title to the beds of navigable waterways is involved.

California ex rel. State Lands Commission v. United States did nothing more than make passing reference in a footnote (..... U.S. ....., at fn. 6) to the dicta in *California v. Arizona* concerning federal sovereign immunity. The limitations provision of section 2409a(f) was not raised by the federal government. The question of asserted federal sovereign immunity concerning the state sovereign title claims involved was therefore not presented for decision.

We are left with the conclusion that a State, in this narrow situation, has a constitutional right of access to

the courts to sue the United States over its sovereign land title claims; and while Congress may make concurrent the jurisdiction that would otherwise be exclusive in this Court under article III, section 2, clause 2 of the Constitution (*Börs v. Preston* (1884) 111 U.S. 252; *Ames v. Kansas* (1884) 111 U.S. 449), it may not constitutionally deprive the States totally of this means of resolving such sovereign claims against contrary claims of the federal government, based on any theory of sovereign immunity.

B. Regardless of the Proffered Justification, Congress May Not Transfer a State's Sovereign Land Title Through the Device of a Statute of Limitations

The state legal principles designed to protect against loss of the States' sovereign trust title in navigable waterways are inextricably bound up with the States' constitutionally retained title to such lands. Congress may not constitutionally interfere with application of such principles. (See *State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. 363, 370-371, 374, 376.) Such principles certainly may not be displaced under the guise of "regularizing" the "procedure" for adjudication of such claims as between a State and the federal government. And we submit that Congress is so inhibited even if, contrary to the above discussion, consent to such suits is required.

For purposes of argument, we can make the following concessions. Congress can enforce statutes of limitations, even against the States, where the claim is one against monies in the federal treasury. (See *United States v. Louisiana* (1888) 127 U.S. 182, 185, 192.) Similarly, Congress could apply a statute of limitations against non-sovereign state title claims to land that was admittedly, at the time of the congressional enactment creating the asserted entitlement, part of the federal public domain. (*Cf. Oregon v. Hitchcock, supra*, 202 U.S. 60; *Price v. Magnolia Petroleum Co.* (1925) 267 U.S. 415 (congressional grants of federal public domain to States).) Perhaps, too, a time limit could be imposed on other types of state title claims,

as long as the claims were not based on the State's retained sovereignty in the beds of navigable waterways. (Cf. *Park County, Montana v. United States* (9th Cir. 1980) 626 F.2d 718 (claim by a *county* to a *road easement*).) And Congress might be able to impose a statute of limitations against state claims for just compensation following condemnation by the federal government in furtherance of some power specifically delegated to it, even where the money claim was for the taking of a State's sovereign lands. (See *United States v. 422,978 Square Feet of Land* (9th Cir. 1971), 445 F.2d 1180, 1187-1189; *People of the State of California v. United States* (Ct. Cl. 1955) 132 F.Supp. 208, 211.)

We assert, however, that a generally applicable statute of limitations regarding title disputes cannot be applied against a State's claim of title to sovereign submerged lands where state law regarding such lands prohibits loss of the State's title through mere passage of time. (See *State of California ex rel. State Lands Commission v. United States* (N.D. Cal. 1981) 512 F.Supp. 36, 45.)

The principle that statutes of limitations do not run against lands in which a State has sovereign trust title is well established. This Court has recognized the special nature of the States' inherent sovereign trust title:

> "[I]t is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State . . . ." (*Illinois Central Railroad v. Illinois, supra,* 146 U.S. 387, 452.)

"The trust with which [such lands] are held therefore, is *governmental and cannot be alienated,*" except in extremely narrow circumstances. (Emphasis added.) (*Id.,* at pp. 455-456.)

Accordingly, under state law established to protect state title to sovereign trust land, it is the rule in many States that statutes of limitations do not run against the State regarding such land. (E.g., *People v. Kerber* (1908) 152 Cal. 731, 733-734 [93 Pac. 878]; *Carr v. Moore* (Iowa 1903) 93 N.W. 52, 54-55; accord, *Weber v. Harbor Commissioners* (1873) 85 U.S. (18 Wall.) 57, 68, 70; Annot. (1957) 55 A.L.R.2d 554, 585-589; cf. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493, 499-501 [91 Cal.Rptr. 23, 476 P.2d 423] (ordinary principles of estoppel do not apply).) The rationale for the rule has been set forth by this Court in a title dispute over this very type of trust land:

> "[E]ven assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act." (*United States v. California* (1947) 332 U.S. 19, 39-40.)

The reason for the rule applies with particular force here. The tremendous acreages to be monitored by state land officers and the elusive and shifting nature of land title in and along waterways have been noted earlier. If the statute of limitations applies here, it is virtually certain that the public's trust title in hundreds of thousands of acres of navigable waterways will be "forfeited" by state employees' "failure to act."[12]

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[12]See also *United States v. Clarke* (1980) 445 U.S. 253, where this Court narrowly construed a federal statute providing that allotted Indian trust lands could be "condemned" by a State, holding

Kerber, *Carr*, and *Weber*, *supra*, all involved claims against a State based upon adverse possession, a doctrine of title acquisition that demands of the person claiming to be an adverse possessor that he engage in all manner of hostile, notorious, exclusive and continuous acts with regard to the subject property.[13] Still less should a statute of limitations be applicable against a State where, as here, it is asserted that the existence of a bare claim, alone, is sufficient with the passage of time to transfer a State's sovereign title to the federal government.[14] A separate adverse possession claim by the federal government was rejected by the district court below (506 F. Supp. at p. 624, fn. 8) and has not been pursued further. The government's assertion

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that such lands were not subject to inverse condemnation. The Court noted that while direct condemnation proceedings require formal notice to the condemnee, inverse condemnation does not involve similar safeguards and shifts a considerable burden of discovery onto the federal government:

> "[I]n the case of Indian trust lands, which present the Government '"'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,'"' [citation omitted] the United States may be placed at a significant disadvantage. . . ." (*Id.*, at pp. 257-258.)

The burden on state officers is similarly great here, given the thousands of miles of navigable waterways subject to possible claims by the federal government as the littoral owner.

[13]See generally, 7 Powell on Real Property, *supra*, at ¶¶ 1012, 1013.

[14]In a similar context, and by way of contrast, this Court has declined to estop a city from asserting title to waterfront property held in trust as a common for its citizens, even in the face of long-term federal use and possession and of repeated congressional enactments, many at the solicitation of the city fathers, that had treated the property as part of the federal public domain. (*New Orleans* v.

of title is therefore based solely on a "claim" of title. At bottom, the thrust of the federal government's argument is that even the thinnest of federal claims, not even accompanied by physical use and possession, may, if unchallenged within the limitation period, work a transfer of title from a State to the federal government of sovereign trust lands.

Such a theory of sovereign land title transfer runs head-on into this Court's holding in *Corvallis, supra,* 429 U.S. at pp. 370-371, 374, 376, that a State's title to the beds of navigable waterways vests absolutely upon statehood and is not subject to later defeasance by operation of federal law. This is merely another instance of the truism that, as a matter of constitutional law, Congress sometimes may not apply to the States the same law that it applies to private citizens. (*National League of Cities v. Usery, supra,* 426 U.S. 833, 845, 849; *New York v. United States, supra,* 326 U.S. 572, 586-588 (Stone, C.J., concurring).)

Because this principle of *Corvallis* is founded in the Constitution and not upon any congressional enactment, Congress may not abrogate it under the rubric of "regularizing" the "procedure" for quiet title suits. Congress may of course limit such suits to the federal courts (28 U.S.C. § 1346(f)), prescribe venue (28 U.S.C. § 1402(d)), require specific types of allegations in the complaint (28 U.S.C. § 2409a(c)), or provide that such cases shall be tried by a court without a jury (28 U.S.C. § 2409a(e)). Such provisions do not run afoul of the Constitution. But just as Congress, as a matter of "procedure" could not constitutionally deprive a litigant of due process by banning

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United States (1838) 35 U.S. (10 Pet.) 662, 734, 735.) The Court held that the city could not lose such trust property, even to the United States, and even where a federal commission had previously rejected the city's title claim, based upon the errors of its officers:

> "[C]ity authorities . . . had not the power, by the acts referred to, to divest the city of a vested interest in this common." (*Id.*, at p. 735.)

cross-examination in such suits,[15] it cannot, as to state sovereign land title, constitutionally impose a statute of limitations. Such a provision cannot be defended as procedural. It is substantive in the most fundamental sense when it purports to transfer title to sovereign trust lands from a State to the federal government. Indeed, petitioners are arguing here that North Dakota was already foreclosed from suing in quiet title when the Quiet Title Act was enacted in 1972. (Petitioners' Br. 34, 35.) The word "procedural" is not so plastic as to cover the harsh substantive impact of such an argument.

In summary, imposition of a statute of limitations here would violate the allotment of sovereignty in the Constitution. If a State, and not the federal government, indeed owns the land in a waterway by inherent right of sovereignty, then the State, as a matter of retained sovereignty not delegated in the Constitution, is entitled to have its law applied; that is, that it cannot lose title to such trust land by operation of a statute of limitations. If, on the other hand, the federal government is the true owner, then the period of limitation is applicable. Again, only a threshold court determination of ownership can determine whether the action is subject to a statutory time bar. And again, though this would incidentally decide the merits of the case, there is nothing exceptionable in this. (Cf. *Land v. Dollar, supra,* 330 U.S. 731, 735; *Ritter v. Morton, supra,* 513 F.2d 942, 945-946.)

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[15]See also *California v. Arizona, supra,* 440 U.S. 59, 66-67, which strongly suggests that Congress could not, in prescribing "procedure" under the Quiet Title Act, constitutionally limit the original jurisdiction of this Court.

II. AT THE VERY LEAST, CONGRESS MUST SPEAK CLEARLY AND UNEQUIVOCALLY IF IT MEANS A STATUTE OF LIMITATIONS TO APPLY TO THE STATES' SOVEREIGN TRUST TITLE IN THE BEDS OF NAVIGABLE WATERWAYS

From the foregoing, it is clear that grave constitutional questions are presented by the asserted application of the limitation period of section 2409a(*f*) to the sovereign land claims of the States. This Court has prescribed the rule of construction for such circumstances:

> "When . . . an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (*Crowell v. Benson* (1932) 285 U.S. 22, 62.)

This Court has invoked this canon concerning the very act at issue here in deciding that, despite the apparently all-encompassing language of 28 United States Code section 1346(*f*), Congress did not intend that section's conferral on the district courts of "exclusive original jurisdiction of civil actions under section 2409a" to apply to suits by a State against the federal government. (*California v. Arizona, supra,* 440 U.S. at pp. 67-69.)

This judicial caution is fortified by a parallel principle calling for strict construction of statutes that arguably authorize an abandonment of the public's trust rights in a State's sovereign land. For instance, the California Supreme Court, in applying the law concerning the common law public trust in navigable waterways enunciated by this Court in *Illinois Central Railroad v. Illinois, supra,* 146 U.S. 387, has stated:

> "[S]tatutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; *and*

> *if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation.*" (Emphasis added.) *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 528 [162 Cal. Rptr. 327, 606 P.2d 362].)

Accordingly, in avoidance of the grave constitutional questions concerning the power of Congress to apply section 2409a(f) to the title claims of the States to navigable waterways held in trust for their people by virtue of their retained sovereignty, we respectfully suggest that this Court should, at minimum, construe the limitations provision of the Quiet Title Act as not applying to such claims. If, to the contrary, Congress wishes the statute of limitations to apply in such circumstances, it should say so in clear and uncertain terms. This was the reasoning of the court of appeals in this case. (*State of North Dakota ex rel. Board of University and School Lands v. Andrus* (8th Cir. 1982) 671 F.2d 271, 275-276.)

Considerations independent of the sovereign nature of the States' title to the beds of navigable waterways support this result. The Quiet Title Act was prompted by a case involving a title dispute between a private person and the federal government (see *California v. Arizona, supra,* 440 U.S. at p. 68, fn. 7); Congress was acting with regard to title claims generally, and not with specific reference to state title claims. This fact, coupled with the failure to expressly mention States in section 2409a(f), suggests that Congress did not mean the limitations provision to apply to them. As this Court noted in *Wilson v. Omaha Indian Tribe* (1979) 442 U.S. 653, general statutory language will often not be construed to include States, "[p]articularly . . . where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage." (*Id.*, at p. 667; accord, *Weber v. Harbor Commissioners, supra,* 85 U.S. (18 Wall.) 57, 70.)

III. SECTION 2409a(f) APPLIES ONLY TO ACTIONS BROUGHT UNDER THE QUIET TITLE ACT; IT DOES NOT APPLY TO ACTIONS AGAINST FEDERAL OFFICERS SUCH AS THIS ONE

The limitations provision of section 2409a(f) applies only to quiet title actions. Suits to restrain wrongful conduct by federal officers involve distinct rights and causes of action that are quite independent of actions in quiet title. One such independent action is a suit for review of agency action under 5 United States Code section 702. We agree with the discussion by the State of North Dakota in its brief concerning actions under section 702 and will not add to that discussion here. Rather, we will discuss actions against federal officers, recognized by this Court for over a century, whereby such individuals can be held accountable for their actions even where asserted federal title to land is incidentally involved. The State of North Dakota has brought such an action here. Such suits have a basis entirely independent of the Quiet Title Act, and that act's statute of limitations is therefore inapplicable.

United States v. Lee, supra, 106 U.S. 196, is the leading case. There, the plaintiff sued federal officers in ejectment regarding their allegedly wrongful possession under a tax deed of Arlington National Cemetery and a military installation. This Court held the tax deed invalid and affirmed judgment for the plaintiff, rejecting the applicability of sovereign immunity. The "suggestion" that title was in the United States was not sufficient to raise the bar. (*Id.,* at p. 210.) Further, because the action was for ejectment against federal officers and not in quiet title against the government itself, the United States would not be bound by res judicata and could itself institute a later action to determine title. (*Id.,* at p. 222.) In succeeding years, the case was repeatedly followed. (E.g., *Land v. Dollar, supra,* 330 U.S. 731, 737, and cases there cited.)

The rationale of *Lee* was narrowed somewhat in *Larson v. Domestic & Foreign Corp.* (1949) 337 U.S. 682, and

Malone v. Bowdoin (1962) 369 U.S. 643, cases whose rationale and unnecessarily harsh impact have been roundly criticized.[16] The cases, however, continue to recognize that persons aggrieved by the wrongful conduct of federal officers may sue for injunctive, declaratory, and related relief. Where such suits are not in effect ones against the United States, the doctrine of sovereign immunity does not apply and the action may proceed. (*Larson, supra,* at pp. 686-688.)

Larson involved an action for injunctive and declaratory relief against a federal agency in which the plaintiff claimed that title to coal at one time admittedly in the United States had since passed to him under the terms of a federal sales contract. This Court held that the suit should have been dismissed as one against the United States, and narrowed the circumstances in which such a suit would lie: the federal agency or officer must either have been acting in excess of his statutory authority, or acting pursuant to an unconstitutional statute. (337 U.S. at pp. 689-691.) *Malone* applied the *Larson* standard to an action in ejectment against a federal officer where the United States claimed record title to the subject land, and no allegations were made under either prong of the *Larson* test for when a federal officer was suable.

The suit filed by North Dakota comes within the ambit of these cases. The State has sued for injunctive relief against federal officers who are exceeding their statutory authority by exercising control over land that the United States does not own and to which it has never had record title. The only possible statutory authority for the federal oil and gas leases in the bed of the Little Missouri River is the Mineral Leasing Act of 1920 (30 U.S.C. § 181, et seq.) or the Mineral Leasing Act for Acquired Lands (30 U.S.C.

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[16]See, e.g., Scalia, Sovereign Immunity and Public-lands Cases (1970) 68 Mich. L.Rev. 867, 872-875, fn. 29; Hart & Wechsler, The Federal Courts and the Federal System, *supra,* at pp. 1362-1377.

§ 351, et seq.).[17] The leasing authority conferred by both acts is limited to lands and mineral deposits "owned by the United States." (30 U.S.C. §§ 181, 352.) If the lands are not in federal ownership, a purported leasing of them is clearly outside the statutory leasing authority. (See *Andros v. Rupp* (9th Cir. 1970) 433 F.2d 70, 72.) Petitioners concede this. (Petitioners' Br. 21.) And, unlike the situations in *Larson* and *Malone*, the United States has never had record title to the bed of the Little Missouri River. (See also *Hawaii v. Gordon, supra*, 373 U.S. 57, 58 (suit barred because requested relief would cause transfer of land "admittedly belonging to the United States").) The bed of the river is not included within the meanders of the federal public land surveys, and federal surveyors had no authority to determine navigability (*Oklahoma v. Texas* (1922) 258 U.S. 574, 585). Nor did they have jurisdiction to determine the boundary between federal public lands and the States' sovereign lands. (*Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 16-19.)[18] If federal surveyors had not the authority

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[17]The Mineral Leasing Act of 1920 pertains only to federal public domain lands. (See 41 Stat. 437 (title of act); *Justheim v. McKay* (D. D.C. 1954) 123 F. Supp. 560, 565-566; 40 Op.Atty.Gen. 9 (1941).) The Mineral Leasing Act for Acquired Lands pertains only to lands purchased or condemned by the United States and not subject to the 1920 act because not part of the public domain. (30 U.S.C. § 352; *Wallis v. Pan American Pet. Corp.* (1966) 384 U.S. 63, 65, fn. 2.)

[18]In *Borax*, it was argued that federal surveyors had the power to determine the boundary between federal upland and the State's tidelands. The Court held that the Land Department had jurisdiction only regarding lands "belonging to the United States," and that this did not include tidelands. (*Id.*, at p. 17.) The Court concluded that the question of ownership was one for *judicial* resolution:

> "Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers." (*Id.*, at pp. 18-19.)

to determine navigability or boundary (and hence ownership as between the federal government as littoral owner and the State as the owner of sovereign trust lands), still less do the officials sued here have such authority.

Both before and after the enactment of section 2409a, the lower federal courts have allowed suits against federal officers by private citizens to proceed, even where federal title claims were incidentally involved, where record title did not exist in the United States at some antecedent point in time. In *Andros v. Rupp, supra,* 433 F.2d 70, a plaintiff claiming title sued a federal officer to enjoin interference with use and enjoyment of certain lands asserted by the officer to be part of a national forest. Record title had gone out of the United States and there was no assertion of later-acquired record title. The court distinguished *Larson* and *Malone* on this basis and concluded that the officer was acting outside his statutory authority. Similarly, in *Armstrong v. Udall* (9th Cir. 1970) 435 F.2d 38, the United States claimed record title to land, but the question was whether the survey relied upon physically included within it the land in question. The court ruled that this threshold jurisdictional question would have to be decided, even though this would incidentally determine the merits. (*Id.,* at p. 42.) A similar question is presented here: whether meanders of the river's edge included, as a matter of law, the bed of the river. The answer turns on the question of navigability.

Ritter v. Morton, supra, 513 F.2d 942, is even closer in point. There, a federal patentee of upland riparian to a river sued to enjoin interference by a federal officer with his use and possession of three islands in the bed of the river that he claimed to own. The river had been meandered but there was ambiguity concerning whether the islands were within or without the meander line. The United States of course had no record title to the islands in the riverbed that it could rely on. The court again concluded that a threshold jurisdictional determination was properly

required concerning whether the islands were included in the survey. If they were, then the suit was not barred as against the United States, but was properly brought against the officer.

These cases apply here. At no prior time, or now, has title to the riverbed been "admittedly in the United States." (See *Hawaii v. Gordon, supra,* 373 U.S. at p. 58.) Neither the State nor the federal government can point to record title to the riverbed, since neither claim is based on a specific land description that includes the bed. The federally surveyed meanders of the river run only along the bank, and the State's sovereign title is based on the Constitution, not on any description in a deed. In these circumstances, the suit is properly within the standards for the bringing of such suits against federal officers that are set forth in the cases of this Court and the lower courts.[19] Whether petitioners may be enjoined depends on the threshold determination of the merits of the ownership claim they are asserting. If the federal government doesn't own the bed of the Little Missouri River, they are exceeding their statutory leasing authority.

Nor is this a case within the exception to the *Larson* rule for cases where the relief requested will require the "disposition of unquestionably sovereign property." (See *Larson, supra,* 337 U.S. at p. 691, fn. 11.) The lack of any clear antecedent title in the United States (compare *Larson, supra,* 337 U.S. 682, 703, where the government clearly had title to the coal prior to the sales contract) removes any possible concern that a judgment here will "expend itself on the public domain".

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[19]Although the issue is not presented in this case, it is our view that, regarding claims by the States to sovereign land, an action would lie against a federal officer even where there was some asserted record title in the federal government. Neither *Larson* nor *Malone* involved title claims to the bed of a navigable waterway based upon the retained sovereignty of the States. (See discussion under argument I, *supra.*)

Neither has section 2409a displaced these traditional actions. In *McClellan v. Kimball* (9th Cir. 1980) 623 F.2d 83, the continuing vitality of these independent actions was recognized. Only because no allegations of the type required by *Larson* and *Malone* were made by the plaintiff did the court feel compelled to treat the suit solely as one under section 2409a. (*Id.*, at pp. 85-86; but see *Cummings v. United States* (5th Cir. 1981) 648 F.2d 289.) Further, merely because the federal government's claimed title is incidentally involved in a lawsuit, that does not operate to funnel all such actions into the category of quiet title actions under section 2409a. Different causes of action may be pursued independently, even though the two actions may share common issues. (See *Sloan Shipyards Corp. v. United States Fleet Corp.* (1922) 258 U.S. 549 (fact that inverse condemnation might lie against the United States did not bar suit against federal agency for recovery of property alleged to have been wrongfully seized); *Larson, supra,* 337 U.S. at pp. 722-723 (Frankfurter, J., dissenting) (remedy under the Tucker Act for just compensation does not displace independent action in tort against federal officer).)

This distinction has a very practical basis. Even if known,[20] a mere conflicting claim to land ownership will not necessarily prompt a lawsuit. The claim may be so obviously weak as to not merit serious concern. More importantly, it may not be paired with any imminent threat to the potential plaintiff's use and enjoyment of the property. In contrast, physical intrusion upon the land by the adverse claimant creates a separate cause of action in tort because of the qualitatively different impact of such conduct on

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[20]The difficulty that state officers will have in discovering such federal claims has already been alluded to. (Cf. *United States v. Clarke, supra,* 445 U.S. 253, 257-258.) This will be particularly so where the federal claim is not paired with any overt physical invasion of the property so as to more readily put the state officers on notice of the claim.

the plaintiff's legal rights. In short, not only is the threshold at which such adverse claims will prompt litigation different; the cause of action itself, in recognition of the different rights violated, is different. It is one thing to have a mere claim asserted against one's property; it is quite another to have an adverse claimant enter one's property and start using it.

For this reason, it is clear that this suit for an injunction against encroachment upon and development of North Dakota's sovereign lands by federal officers (see par. 14 of Amended Complaint and par. 1 of prayer (Jt. App. 15, 16)) is different in kind from a quiet title action filed under section 2409a in response to a mere claim of title, which often will not be paired with independent tortious conduct. Petitioners' remark that the leasing of the riverbed by federal officers was "largely fortuitous" (Petitioners' Br. 22, fn. 15) does nothing to displace the conclusion that a cause of action separate and distinct from one in quiet title was created by such conduct. No statute of limitations runs on such continuing wrongful conduct by federal officers. (See *Underwater Storage, Inc. v. United States Rubber Co.* (D.C. Cir. 1966) 371 F.2d 950; Rest.2d Torts, § 161, com. b, § 899, com. d.)

Accordingly, because this suit was one that was legitimately pursued independent of the authorization for suit in the Quiet Title Act, that act's statute of limitations does not apply.

CONCLUSION

Because this case proceeds on a basis independent of the provisions of section 2409a, that section's statute of limitations does not apply. But even if the statute would otherwise be applicable to private citizens as the exclusive source of jurisdiction over cases in any way involving title claims adverse to the United States, the section's limitation period cannot be applied, regardless of the proffered justification, as against a State that is asserting title to the bed of a navigable waterway that it claims by right of retained

sovereignty not delegated to the federal government under the Constitution. At the very least, Congress has not spoken with sufficient clarity concerning the applicability of the section's limitation period to state sovereign land claims. To avoid the grave constitutional question that would otherwise be presented, this Court should construe the section's statute of limitations as not applying to the States in the narrow circumstances here presented.

The twenty-eight amici States respectfully request that the decision of the court of appeals be affirmed, in order that the States' sovereign title to navigable waterways across the country might be protected against loss based only on the mere passage of time and a bare claim of federal ownership.

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Respectfully submitted,

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